

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

ALLIANCE FOR SAFE, EFFICIENT)
AND COMPETITIVE TRUCK)
TRANSPORTATION; AIR &)
EXPEDITED MOTOR CARRIERS)
ASSOCIATION; THE EXPEDITE)
ASSOCIATION OF NORTH AMERICA;)
NATIONAL ASSOCIATION OF SMALL)
TRUCKING COMPANIES;)
TRANSPORTATION LOSS)
PREVENTION AND SECURITY)
ASSOCIATION; ALLEN LUND)
COMPANY, INC.; BOLT EXPRESS,)
LLC; BP EXPRESS, INC.; CARRIER)
SERVICES OF TENNESSEE, INC.;)
CONARD TRANSPORTATION, INC.;)
DES MOINES TRUCK BROKERS, INC.;)
FORWARD AIR, INC.; MEDALLION)
TRANSPORT & LOGISTICS, LLC;)
REFRIGERATED FOOD EXPRESS,)
INC.; SNOWMAN RELIABLE)
EXPRESS, INC.; TRANSPLACE, LLC;)
and TRIPLE G EXPRESS, INC.,)

CASE NO. 12-1305

Petitioners,

- vs. -

FEDERAL MOTOR CARRIER SAFETY)
ADMINISTRATION and THE)
HONORABLE RAY LAHOOD, in his)
official capacity as SECRETARY OF)
TRANSPORTATION,)

Respondents.

**NATIONAL CONFECTIONER'S LOGISTICS COUNCIL, INC.'S
MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF**

Pursuant to D.C. Cir. Rule 29(b) and Fed. R. App. Proc. 29(a), the National Confectioners' Logistics Council, Inc. ("NCLC"), by and through counsel, requests leave to file an *amicus* brief in support of petitioner Alliance for Safe, Efficient and Competitive Truck Transportation ("ASECTT") et al. ASECTT's petition seeks to clarify and ensure that NCLC members and other shippers using for-hire interstate trucking services can rely on publication by the Federal Motor Carrier Safety Administration ("FMCSA" or "Agency") of its final determinations concerning the safety fitness of individual motor carriers, to the exclusion of any conflicting state law or duty for private parties to make such determinations.

Consistent with the Agency's settlement in *NASTC et al. v. FMCSA*, No. 10-1402 (D.C. Cir. 2010), NCLC submits that the same Agency's May 16, 2012 release entitled, "New Resources Available for Shippers, Brokers, and Insurers" should be retracted and further publication of SMS methodology and percentile rankings for public use should be removed until such time as Congress, or this Court, following rulemaking, otherwise directs. In its brief, NCLC will explain why the May 16th release imposes new credentialing rules and duties on shippers and, contrary to the current law and statute, imposes costly, unsustainable burdens which are contrary to the National Transportation Policy at 49 U.S.C. § 13101. No other party to this proceeding represents the confectionary industry which will be directly affected by the action under review in this proceeding.

NCLC is a national trade association with “shipper members” who manufacture candy, confectionary and related goods and distribute them in interstate commerce, utilizing motor carrier vendors which are certified by the Agency as fit to operate on the nation’s roadways. NCLC also has “carrier members” who themselves are regulated motor carriers providing interstate services to the confectionary industry.

As members of the shipping public, NCLC’s shipper members are not charged under federal statute or regulation with any separate or special duty to credential motor carriers as safe for use. Like any other consumers of interstate transportation, NCLC’s shipper members are the intended beneficiaries of the preemptive effect of the Agency’s final safety fitness determination (“SFD”) under federal statutes and regulations pertaining to motor carrier safety. They are not required to second guess the Agency’s expertise under penalty of diverse conflicting state laws imposing tort liability for “negligent selection” under standards which are both implicitly and expressly preempted.

The challenged actions of the FMCSA publicly repudiate the effectiveness of the Agency’s own SFD under existing regulations as the standard for public use, and purport to impose new duties on NCLC shipper members -- in effect exposing each to ambiguous selection standards and obligations to use the Agency’s unvetted SMS methodology under penalty of exposure to increased tort liability under state law. In its May 16th release the Agency enunciated no clear standards

or effective way for the public to interpret its percentile-based SMS rankings. NCLC members simply are unable to shoulder the burden of making their own safety fitness evaluations of each motor carrier before use. It is not their job; they do not have the expertise, resources, time or financing to undertake these duties.

With respect to carrier members of NCLC, the May 16th release has the effect of branding half of those carrier members as unfit for use by NCLC's shipper members.

The petitioners, ASECTT et al., consent to NCLC's filing of an *amicus* brief. Respondents Federal Motor Carrier Safety Administration and The Honorable Ray LaHood, in his official capacity as Secretary Of Transportation, do not plan to oppose NCLC's filing of an amicus brief.

WHEREFORE, for the foregoing reasons, movant National Confectioner's Logistics Council, Inc. respectfully requests leave to file an *amicus curiae* brief in support of the petition in this action.

Dated: December 10, 2012

Respectfully submitted,

/s/ Gerald K. Gimmel

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Cir. Rule 26.1, movant National Confectioners' Logistics Council, Inc. ("NCLC") states that it is a non-profit national trade association. NCLC represents the interests of the logistics personnel of confectionery manufacturers and importers and of the motor carrier companies they utilize before regulatory agencies and legislative bodies. NCLC does not have any parent corporations, and no publicly held company owns any stock in NCLC.

Dated: December 10, 2012

Respectfully submitted,

/s/ Gerald K. Gimmel

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 10th day of December, 2012, I have caused the foregoing “**NATIONAL CONFECTIONERS’ LOGISTICS COUNCIL, INC.’S MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF,”** together with the accompanying Corporate Disclosure Statement, to be filed electronically with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to the following registered CM/ECF users:

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